JAN 15 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

—o—

No. 805

—o—

WILLIAM FRASER, ET UX., Petitioners

VS.

P. M. BARTON, ET AL., Respondents

—o—

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, STATEMENT OF THE CASE, BRIEF AND ARGUMENT ON BEHALF OF RESPONDENTS, P. M. BARTON, ET AL.

L. E. GWINN,
Memphis, Tennessee
Solicitor for Respondents

FRED CALLAHAN,
Memphis, Tennessee

GRANVILLE FARRAR,
Memphis, Tennessee
Of Counsel.

THE DAILY NEWS

SUBJECT INDEX

Pages

STATEMENT OF THE MATTER INVOLVED.. 1-12

JUDGMENT OF THE DISTRICT COURT 13

JUDGMENT OF CIRCUIT COURT OF APPEALS 13

SUMMARY OF QUESTIONS INVOLVED 14-15

ARGUMENT 15-25

Supreme Court Exercises Most Sparingly Its Power to Grant Writ of Certiorari 15-16

Supreme Court Will Generally Refuse to Review Concurrent Findings of Fact 16-17

Judicial Estoppel Not Applicable 17-22

(a) The Statement Must be Under Oath 17-18

(b) Statements Made Inconsiderately or by Mistake 19

(c) Statement Must be Wilfully False..... 19-20

(d) Necessity of Prejudice Resulting 20-22

Petitioner Contracted With Respondents to Pay the Government Penalties 23-25

CONCLUSION 26

ACKNOWLEDGEMENT OF SERVICE 27

INDEX OF AUTHORITIES

Pages

Ala. Power Co. v. Ickes (1938) 302 U. S. 464, 58 S. Ct. 300, 302, 82 L. Ed. 374 16

Ament v. Bremen, 1 Tenn. Chy. 431 19

Am. Constr. Co. v. Jacksonville R. Co., 148 U. S. 372, 383, 13 S. Ct., 758, 37 L. Ed. 486, 491 16

Anderson v. Abbott, (Ky. 1944), 321 U. S. 349, 64 S. Ct. 531, 88 L. Ed.—Rehearing denied 64 S. Ct. 845, 88 L. Ed— 16

Anderson v. Norton, 83 Tenn. 14, 31 19

Behr v. Conn. Mut. Life Ins. Co., 4 F. 357, 362 19

Black Diamond Collieries v. Deal, 150 Tenn. 474, 477 19

Broyles v. Scottish Union Ins. Co. 16 Tenn. App. 331, 336 19

Chilton v. Scruggs, 73 Tenn. 308 19

Decherd v. Blanton, 35 Tenn. 373 19

Fidelity Trust Co. v. Norton, 10 Tenn. App. 132 20

Fields v. U. S., 205 U. S. 292, 296, 27 S. Ct. 543, 51 L. Ed. 807, 810 16

Forsyth v. Hammond, 166 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095 15

Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., 321 U. S., 275, 64 S. Ct. 593, 88 L. Ed.— 16

Hamilton v. Zimmerman, 37 Tenn. 48 18-19-20

Harris v. Columbia Co., 114 Tenn. 328 19-20-21

Helm v. Wright, 21 Tenn. 72 19

Houston Oil Co. v. Goodrich, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385 16

In re: Woods, 143 U. S. 202, 12 S. Ct. 417, 36 L. Ed. 125 15

Jetton v. Nichols, 8 Tenn. App. 567 20

Johnston v. Ry. Co., 146 Tenn. 135, 240 S. W. 429 18

Lau Ow Bew, Petitioner, 141 U. S. 583, 587, 12 S. Ct. 43, 35 L. Ed. 868, 869 15

Lau Ow Bew v. U. S., 144, U. S. 47, 12 S. Ct., 517 36 L. Ed. 340, 344 16

INDEX OF AUTHORITIES—(Continued)

	Pages
McEwen v. Jenks, 74 Tenn. 289	19
McLemore v. Charleston Ry. 111 Tenn. 639	18-19-20-21
Michie's Tenn. Digest, Vol. 6, p. 452, 454	19-20
Sanford v. Weeden, 49 Tenn. 71	19-20
Sartain v. Dixie Coal Co., 150 Tenn. 633	17-20
Schultz, etc. Co. v. Bell, 23 Tenn. App. 258	20
Seay v. Ferguson, 1 Tenn. Chy. 287, 295	19
Singleton v. Ake, 22 Tenn. 626	19-20
Smith v. Fowler, 80 Tenn. 163, 171	18
So. Coal & Iron Co., v. Schwoon, 145 Tenn. 191, 227	18-20
State v. Amer. Bldg. & Loan Assn., 177 Tenn. 385	20
State of Ohio, ex rel Seney v. Swift & Co., 260 U. S. 146, 43 S. Ct. 22, 67 L. Ed. 176	15
Stearns Coal Co. v. Jamestown R. Co., 141 Tenn. 203	20
Texas & N. O. R. Co. v. Brotherhood of Ry. & Steamship Clerks (Tex. 1930), 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034	17
The Linseed King (N. Y. 1932) 285 U. S. 502, 52 S. Ct. 450, 76 L. Ed. 903	17
Virginian Ry. Co. v. System Fed. No. 40 (Va. 1937), 300 U. S. 515, 57 S. Ct., 592, 81 L. Ed. 789	17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

—o—

No.

—o—

WILLIAM FRASER, ET UX, Petitioners

VS.

P. M. BARTON, ET AL., Respondents

—o—

STATEMENT OF THE MATTER INVOLVED

Respondents Barton and associates will be referred to as respondents and petitioner Fraser as petitioner, since the primary controversy as to respondents Barton and associates is with Fraser alone on this application for certiorari.

P. M. Barton, on behalf of himself, his associates, and a number of their tenants instituted the above action against the respondents Fraser and his associate Britton for the purpose of obtaining an accounting with respect to the sale of certain cotton which was marketed in the spring and early summer of 1942. Respondents sought a

money judgment in the amount of the net proceeds of the sale of what they believed at that time to constitute 1859 bales of low grade cotton, and also sought an accounting. (Tr. pp. 3-9).

On the 23rd day of March, 1942, they contend that an oral agreement was had between P. M. Barton et al on the part of respondents and Wm. Fraser of the G. H. Britton Cotton Co., and the other appellee, Britton, whereby it was agreed that G. H. Britton Cotton Co., through their representative or agent, William Fraser, would attempt to sell approximately 3000 bales of low grade cotton. On the 2nd day of April, 1942, confirming this agreement, G. H. Britton Cotton Co., addressed the following letter to P. M. Barton, Three Way Land Co., Catron, Missouri, to-wit:—

"

G. H. BRITTON COTTON CO.
48 So. Front Street,
Memphis, Tenn.
4-2-42.

Mr. P. M. Barton,
3 Way Land Co.,
Catron, Mo.

Dear Mr. Barton:

Confirming our conversation of the 23rd. We are to sell your snap cotton at a price of 15½c per lb. (This does not include your son's cotton). We have until May 10th inclusive to do this unless the Govt. takes over the cotton.

I don't think, Mr. Barton, that the information we had yesterday with reference to the Govt. is authentic, however, I will keep posted so we could act on the equities if necessary.

My understanding is that you would prefer selling the equities at a price of $7.00 per bale above loan values, this I will keep in mind and submit anything we run across.

Hope Mr. David Barton sees fit to let us have his cotton.

Certainly I am going to do my level best for anyone I represent and I do appreciate your cooperation.

Referring to your question about SLIM dull cotton. There is practically no demand, but I am sure it is worth 18¼c.

I have located 2 mills who are changing their manufacture to the lower grades. I will see them Monday.

Thanking you and with best wishes.

Sincerely yours,

G. H. BRITTON COTTON CO.
By Wm. Fraser."

(Tr. pp. 3-5, 569, 570)

By the terms of this letter P. M. Barton, his associates and their tenants understood that the cotton would either be sold for not less than 15½c per pound or their equities in the cotton would be sold to average not less than $7.00 per bale net to them. (Tr. pp. 576-578, 563-565)

On April 6, 1942, P. M. Barton for the Three Way Land Co., addressed the following letter to G. H. Britton Cotton Co., to-wit:

"THREE WAY LAND COMPANY,
April 6, 1942.

G. H. Britton Cotton Company
48 South Front Street,
Memphis, Tennessee.

Gentlemen:

With reference to the 3,000 bales of snapped cotton that we put in the loan through the Midsouth, I will be in Memphis one day this week and will go over the proposition with you. I do not think it is a good idea for us to move the samples from the Midsouth without going over the matter with them personally, as they put the cotton in the loan for us and we feel as if we should give them a change to handle it for us.

We probably will be able to work it out when I get in Memphis, even if we have to resample the cotton and give you samples on it.

So, just let it ride until later in the week, when I will be in Memphis.

Very truly yours,

P. M. BARTON,

PMB/nis President, Three Way Land Company."

(Tr. pp. 571-572)

In no wise contradicting but supplementing the contract embodied in the letter of April 2, 1942, a verbal understanding was reached with reference to the escrowing of the penalties. By this verbal understanding it was

agreed that if the cotton was sold by the pound, to-wit, 15½c per pound, the amount of penalty due the Government by reason of the fact that the cotton was produced on land in excess of the Government allotment would be placed by Fraser & Britton in an escrow agreement and that they would see to it that a receipt would be mailed by the escrow agent, the treasurer of the County Committee, to respondents. If the equity in the cotton was sold the $7.00 per bale for respondents' equity would be mailed to them at once and at the same time petitioner would pay certain loans to the Mid-South Cotton Growers Association outstanding against said cotton and would also escrow the Government penalty. None of this testimony was objected to and is now a part of the record and properly so since it was not contradictory to any provision of the written contract of April 2, 1942, but merely supplementary thereto.

(Tr. pp. 576-580, 563-565)

On April 20, 1942, G. H. Britton Cotton Co., by Wm. Fraser, addressed the following letter to P. M. Barton, Three Way Land Company, Catron, Mo., to-wit:

"4-20-42

Mr. P. M. Barton
3 Way Land Co.,
Catron, Mo.

Dear Mr. Barton:

We have received the samples of 300 bales your snaps. We believe that we can sell this cotton however we cannot tell about what the cotton will bring at this stage of our work, but know the price will be satisfactory.

• • • • •

Yours truly,

G. H. BRITTON COTTON CO.,
By Wm. Fraser."
(Tr. pp. 574-575)

On April 24, 1942, G. H. Britton Cotton Co., addressed to P. M. Barton, Three Way Land Co., Catron, Mo., the following letter, to-wit:

"

G. H. BRITTON COTTON CO.
Memphis, Tenn.
4-24-42

Mr. P. M. Barton, 3 Way Land Co., Catron, Mo.

Dear Mr. Barton:

This will confirm option given us today on 3000 bales your snap cotton at $7.00 per bale above loan value, good until Tuesday April 28. With the privilege of taking 1000 bales and/or 2000 bales and/or 3000 bales.

The cotton to be billed to us at loan value. The $7.00 per bale is to be paid to yourselves.

We are not interested in any Government tax.

I hope we can get the trade thru.

Thanking you, we are

Yours very truly,

G. H. Britton Cotton Co.

By Wm. Fraser."
(Tr. pp. 575-576)

On receipt of this letter P. M. Barton talked with Wm. Fraser either in Memphis or by long distance, in which conference P. M. Barton requested Wm. Fraser to clarify his letter of the 24th and explain what he meant by the words "We are not interested in any Government tax". In answer to this question Mr. Fraser assured plaintiff, P. M. Barton, that that was a correct statement of the situation, that they were not interested in the tax nor was P. M. Barton or his associates and tenants interested in the tax. Mr. Fraser stated that what he had done was that he had simply sold the equity in the cotton, that his understanding of the letter of April 2, 1942, concerning the sale of the cotton was that Barton and his associates would prefer to sell their equity and have the buyer pay the loans due the Mid-South Cotton Growers Association and the Government penalty. (Tr. pp. 576-577)

On April 27, 1942, the following letter was written by the G. H. Britton Cotton Co., of Memphis, Tenn., and was addressed to P. M. Barton, Three Way Land Co., Catron, Mo., to-wit:

"

G. H. BRITTON COTTON CO.
Memphis, Tenn.
4-27-42

Mr. P. M. Barton
3 Way Land Co.,
Catron, Mo.

Dear Mr. Barton:

As per telephone conversation this afternoon.
We confirm sale of 1000 bales your snap cotton at $7.00 per bale above loan value, as per option given to us April 24, 1942.

• • • • •

Yours very truly,
G. H. Britton Cotton Co.
Wm. Fraser". (Tr. pp. 578-579)

P. M. Barton, upon receipt of this letter discussed the matter again with Wm. Fraser and told him that the letters were not clear, that the letter of April 27, confirming the sale of 1000 bales of cotton mentioned their letter of April 24th. P. M. Barton was further assured by Wm. Fraser that in the future he would either state "for your equity" or "net to you". (Tr. pp. 579-580)

P. M. Barton on May 5, 1942, received a telegram addressed to "P. M. Baron care Heifel Cotton Co.", which telegram was delivered to him at Blytheville, Arkansas, and was signed "B. H. Britton Cotton Co. Fraser". P. M. Barton assumed that this telegram was intended for him and that the "B. H. Britton Cotton Co." was intended to be G. H. Britton Cotton Co. Said telegram is in words, and figures as follows:

"P. M. Baron 1942 May 5 AM 11 56
Care Heifel Cotton Co VK

We confirm two hundred bales your cotton at 8.00 *net* per bale for equity. Haven't heard from big lot as yet. Call me

B. H. Britton Cotton Co Fraser."
(Tr. p. 580)

This telegram stated definitely that the *net* for the equity of P. M. Barton, his associates and tenants was $8.00 per bale. Either the same day or one day later the G. H. Britton Cotton Co., addressed a letter to P. M. Barton, Catron, Mo., in words and figures as follows:

" G. H. BRITTON COTTON CO.
Memphis, Tenn.
5-5-42

Dear Mr. Barton:

As per telephone conversation today we confirm 400 bales your cotton @ $8.00 *net*, per bale above 1941 loan value.

Please acknowledge. Thanks.

Yours very truly,

G. H. Britton Cotton Co.

Wm. Fraser"

This letter confirmed the sale of 400 bales of cotton at $8.00 *net* per bale. (Tr. pp. 580-581)

On May 8, 1942, G. H. Britton Cotton Co. addressed a letter to P. M. Barton, Catron, Mo., in words and figures as follows:

" G. H. BRITTON COTTON CO.
Memphis, Tenn.
5-8-42

Mr. P. M. Barton
Catron, Mo.

Dear Mr. Barton:

As per telephone conversation we confirm purchase 100 bales snaps @ $7.00 per bale *net* to you.

Yours very truly,

G. H. Britton Cotton Co.

Wm. Fraser''

This letter contained among other things ''$7.00 per bale *net* to you''. (Tr. pp. 581-582)

On May 11, 1942 the G. H. Britton Cotton Co. addressed a letter to P. M. Barton, Catron, Mo., in words and figures as follows:

'' G. H. BRITTON COTTON CO.
Memphis, Tenn.
5-11-42

Mr. P. M. Barton
Catron, Mo.

Dear Mr. Barton:

We confirm sale 200 b/c @ $7.00 per bale above loan value *net* to you.

Yours very truly,

G. H. Britton Cotton Co.

By Wm. Fraser''

This letter confirmed a sale of 200 bales of cotton at ''$7.00 per bale above loan value *net* to you.'' (Tr. p. 582)

On May 15, 1942, the G. H. Britton Cotton Co. addressed a letter to P. M. Barton, Catron, Mo., in words and figures as follows:

" G. H. BRITTON COTTON CO.
Memphis, Tenn.
5-15-42

Mr. P. M. Barton
Catron, Mo.

Dear Mr. Barton:

We confirm purchase as follows:

100 b/c @ $7.00 *net* above loan value.

125 b/c @ $6.00 above loan value.

Will have more we hope Monday.

Yours truly,

G. H. Britton Cotton Company"

This letter contained among other things the statement "100 bales of cotton at $7.00 *net* above loan value" and "125 bales of cotton at $6.00 above loan value".

(Tr. pp. 582-583)

These letters set forth the written evidence of the chronological order of events insofar as the sale of the cotton in question was made to petitioner Fraser and Britton.

The cotton involved amounted to 1853 bales of which 1833 was "red card" or penalty cotton. Fraser and Britton sold the cotton for some $123,111.95. From the proceeds they discharged a loan thereon of $64,140.18, held by the Mid-South Cotton Growers Association. (Tr. pp. 107, 108, 155). They did not pay the penalty of $55,762.14 or any part thereof nor did they remit to respondents the sum of $12,971.00. They also refused to account to respondents in any manner. (Tr. pp. 155-156).

Suit for an accounting was first brought in Missouri on May 22, 1942, in the name of the Three-Way Land Company, then a corporation, but was withdrawn for defective service. (Tr. pp. 148, 587). This corporation was dissolved on July 27, 1942, pursuant to resolution of February 2, 1942. (Tr. pp. 573-4, 592-3). All assets were divided between P. M. Barton, R. L. Taylor and H. Highfill and the cotton in question was owned one-fourth by them jointly and the remaining three-fourths by the tenants. (Tr. pp. 106, 148). The present action was brought by P. M. Barton for all interested parties and by express authorization from them. (Tr. 589-91).

Petitioner Fraser in his answer denied practically all allegations of the complaint and particularly that he or the Britton firm had agreed to pay the penalties, but contended respondents had agreed to do so. (Tr. pp. 70-74). He also plead estoppel for them to claim ownership of the cotton in this action and ownership in the Three Way Land Company in the Missouri suit and estoppel by reason of the Missouri action being predicated on an alleged letter of April 24, 1942, and the present one on a letter of April 2, 1942. (Tr. pp. 69, 589). For further defense and by way of cross-claim he contended for damages by reason of the refusal of respondents to deliver all of the cotton originally contemplated. (Tr p. 75)

The United States of America filed an intervening complaint against all parties to recover the unpaid marketing penalties. (Tr. pp. 10-20).

During the trial Wm. Fraser and his wife were required to pay into court some $28,875.00 which she was concealing on her person. (Tr. p. 56). Britton voluntarily paid in $1875 (Tr. p. 58) in bonds and P. M. Barton sur-

rendered voluntarily an uncashed check for $2,711.00 which represented the only remittance he had received from the sales. (Tr. p. 60)

JUDGMENT OF THE DISTRICT COURT

The Court upheld the validity of the seven cent penalty and rendered judgment against both petitioner and respondents for the sum of $55,762.15 in favor of the Government. Proper credit was allowed for the some $33,461.00 paid into Court. Appellants were granted judgment against Fraser and Britton for $12,971.00 as the aggregate sale price of the equities at $7.00 per bale *net* to them as they had contended they were entitled to. The temporary injunction against appellees restraining them from disposing of any of the cotton or its proceeds was made permanent. All costs were assessed against Frazer and Britton. (Tr. pp. 161-169).

P. M. Barton et al. and William Fraser both perfected appeals from the adverse portions of the judgment, but no appeal was taken by Harris Britton.

JUDGMENT OF THE CIRCUIT COURT OF APPEALS

The Circuit Court of Appeals affirmed in toto the action of the trial court. (Tr. 975-6).

SUMMARY OF QUESTIONS INVOLVED AS TO THESE RESPONDENTS

I.

Whether their equities in the cotton herein involved were sold by P. M. Barton and his associates and co-plaintiffs to William Fraser and G. H. Britton, individually and doing business as G. H. Britton Cotton Company, under an agreement whereby they were to be paid therefor by said buyers $7.00 per bale net above all fixed charges against said cotton, including the loan to the Mid-South Cotton Growers Association and the marketing penalties.

II.

Whether Fraser and Britton are entitled to set-off, recoup or counter claim any damages from respondents for their failure to deliver the entire 2375 bales of cotton contracted to be sold to them; and whether their pleas and cross-complaints seeking to do so were properly overruled and disallowed.

III.

Are respondents estopped to prosecute the present action by reason of any alleged inconsistency between it and the action which they filed in Missouri?

Was the latter action properly brought in the name of The Three Way Land Company, which corporation was dissolved before the institution of the present action necessitating it being brought in the name of the individual plaintiffs? Likewise, was the letter of April 2, 1942, mentioned in the complaint in this cause and introduced in evidence the same as that alleged to be dated April 24,

1942, in the Missouri suit and through oversight, mistake and inadvertence of the draftsman incorrectly referred to in the Missouri action as of April 24, 1942, rather than April 2, 1943? Did any estoppel result therefrom? Fraser's petition challenges the ruling of the Courts in respondents' favor.

ARGUMENT

I. The Supreme Court Exercises Most Sparingly Its Power To Grant Certiorari

Writs of certiorari to review judgments of the Circuit Courts of Appeal are only granted under special circumstances.

> State of Ohio ex rel Seney v. Swift & Co., 43 S. Ct. 22, 260 U. S. 146, 67 L. Ed. 176.

"While this power is co-extensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised *****".

> Forsyth v. Hammond, 166 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095.

"As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."

> Lau Ou Bew, Petitioner, 141 U.S. 583, 587, 12 S. Ct. 43, 35 L. Ed. 868, 869;
>
> In re: Woods, 143 U. S. 202, 12 S. Ct. 417, 36 L. Ed. 125;

Lau Ou Bew. vs. U. S., 144 U. S. 47, 12 S. Ct., 517, 36 L. Ed. 340, 344;

Am. Constr. Co. vs. Jacksonville R. Co., 148 U. S. 372, 383, 13 S. Ct. 758, 37 L. Ed. 486, 491;

Fields vs. U. S., 205 U. S. 292, 296, 27 S. Ct., 543, 51 L. Ed. 807, 810;

Houston Oil Co. vs. Goodrich, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385.

Ordinarily The Supreme Court Will Not Grant Certiorari To Review Concurrent Findings of Facts By The District Court and Circuit Court of Appeals.

It must be a strong case in which the Supreme Court will set aside concurrent findings of District Court and Circuit Court of Appeals regarding validity and infringement of a patent, Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., (111, 1944), 64 S. Ct. 593, 321 U. S. 275, 88 L. Ed.

The Supreme Court would accept findings of District Court concurred in by Circuit Court of Appeals where no clear error was shown. Anderson v. Abbott, (Ky. 1944), 64 S. Ct. 531, 321 U. S. 349, 88 L. Ed.—, rehearing denied 64 S. Ct. 845, 88 L. Ed.

Findings made after hearing by District Judge on undisputed or conflicting evidence, not questioned by appellate court and not without substantial support in evidence, were accepted by the Supreme Court as unassailable. Alabama Power Co. v. Ickes, (1938), 58 S. Ct. 300, 302 U. S. 464, 82 L. Ed. 374.

Concurrent findings of fact of District Court and Circuit Court of Appeals which were not shown to be plain-

ly erroneous or unsupported by evidence were accepted by Supreme Court as conclusive basis for its decision. Virginian Ry. Co. v. System Federation No. 40 (Va. 1937) 57 S. Ct. 592, 300 U. S. 515, 81 L. Ed., 789.

On a question of fact the Supreme Court will accept the consurrent findings of the District Court and Circuit Court of Appeals supported by substantial evidence. The Linseed King (N. Y. 1932) 52 S. Ct. 450, 285 U. S. 502, 76 L. Ed. 903.

The Supreme Court accepts findings in which two courts concur, unless clear error is shown. Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks (Tex. 1930) 50 S. Ct. 427, 281 U. S. 548, 74 L. Ed. 1034.

JUDICIAL ESTOPPEL NOT APPLICABLE

There are several reasons why the doctrine of judicial estoppel is not applicable to the case at bar:

(a) The Statement Must Be Under Oath.

In the first place the decisions in Tennessee seem to require that the statement be made under oath in a former judicial proceeding. Perhaps the leading case on judicial estoppel in this State is that of *Sartain v. Dixie Coal & Iron Co.*, 150 Tenn. 633, and the language there used lays great stress on the statement being made under oath:

> "The term 'judicial estoppel' as used in our reports indicates particularly that class of estoppels arising from *sworn* statements made in the course of judicial proceedings, generally in a former liti-

gation, although in two of our cases the statement was made either in a pleading (Smith v. Fowler, 12 Lea 163) or in testimony (Johnston v. Ry. Co., 146 Tenn. 135, 240 SW 429), in the same case.

"In all the others, however, the basis of the estoppel claimed was a *sworn* statement made in a former proceeding. (Citing numerous cases).
(P. 647)

"It is, as already stated, based solely upon that public policy which upholds the sanctity of an *oath*, and precludes a party who has made a *sworn* statement—even in another litigation—from repudiating the same when he thinks it to his advantage to do so.

It might well be termed '*estoppel by oath*'."
(P. 650)

In point also is the language of Mr. Justice Beard in *McLemore v. Charleston R. R.*, 111 Tenn. 639: "The policy of the law will not permit anyone to gainsay what he has deliberately *sworn* to in the course of a judicial proceeding."

Pertinent in this regard is the following from *Hamilton v. Zimmerman*, 5 Sneed 48:

"And this doctrine applies with peculiar force, to admissions or statements made under the sanction of an *oath*, in the course of judicial proceedings. The chief security and safeguard for the purity and efficiency of the administration of justice, is to be found in the proper reverence for the sanctity of an *oath*."

See also *Sou. Coal & Iron Co. v. Schwoon*, 145 Tenn. 191, 227.

(b) Statements Made Inconsiderately Or By Mistake.

The Tennessee cases with one accord say "that if made inconsiderately or by mistake, the party ought certainly to be relieved from the consequences of his error." *Behr v. Conn. Mut Life Ins. Co.*, 4 F. 357, 362.

"Admissions or statements made under oath in a pending cause may be relieved against where made inconsiderately or by mistake." Michie's Digest, Vol. 6, p. 452, citing Harris v. Columbia Co., 114 Tenn. 328, 340, 85 SW 897; McLemore v. Charleston Ry., 111 Tenn. 639, 69 SW 338; Smith v. Fowler, 80 Tenn. 163, 171; Hamilton v. Zimmerman, 37 Tenn. 40; Seay v. Ferguson, 1 Tenn. Chy. 287, 295; Decherd v. Blanton, 35 Tenn. 373; Helm v. Wright, 21 Tenn. 72.

See also: *McEwen v. Jenks*, 74 Tenn. 289; *Ament v. Bremen*, 1 Tenn. Chy. 431; *Sanford v. Weeden*, 49 Tenn. 71; *Chilton v. Scruggs*, 73 Tenn. 308; *Anderson v. Norton*, 83 Tenn. 14, 31.

(c) Statement Must Be Wilfully False

A judicial estoppel is based upon bad faith and a sworn statement relied upon to establish it must have been made knowingly or with such a degree of negligence that the Court will impute knowledge to the affiant.

Broyles v. Scottish Union Ins. Co., 16 T. App. 331, 336.

As stated in *Black Diamond Collieries v. Deal*, 150 Tenn. 474, 477:

> "However, mistaken statements or such as involve an opinion, and are not the assertion of a fact

> do not raise an estoppel. The oath to be binding as an estoppel must be wilfully false."

Two of the most recent authorities requiring that the statement be "wilfully false" are the cases of *Schultz, etc. Co. v. Bell*, 23 Tenn. App. 258, and *State v. Amer-Bldg. & Loan Ass'n.*, 177 Tenn. 385.

(d) Necessity of Prejudice to Adverse Party.

It is true that judicial estoppel is based upon public policy and not upon prejudice to the adverse party. *Fidelity Trust Co. v. Norton*, 10 Tenn. App. 132; *Sartain v. Dixie Coal Co.*, 150 Tenn. 633; *Stearns Coal Co. v. Jamestown R. Co.*, 141 Tenn. 203; *Jetten v. Nichols*, 8 Tenn. App. 567. However, the courts are much more inclined to grant relief where the adverse party has suffered no prejudice.

As said in Michie's Digest, Vol. 6, p. 454:

> "But admissions or statements made in unsworn pleadings which have worked no detriment to the adverse party may be relieved against where made inconsiderately or by mistake. Harris v. Columbia Co., 114 Tenn. 328; McLemore v. Charleston R. Co., 111 Tenn. 639; Singleton v. Ake, 22 Tenn. 626; Hamilton v. Zimmerman, 37 Tenn. 40, etc."

In *Sou. Coal & Iron Co. v. Schwoon*, 145 Tenn. 191, counsel for the Coal Company in a tax proceeding before the County Court for a change in the assessment records so as to relieve his client from certain tax liability stated that it did not own certain lands. Later in the reported case it attempted to assert title to those same lands and Judicial estoppel was sought to be invoked.

> "We do not think the rule should be extended so as to bind the parties to the unsworn statements of their counsel where such statements are made orally by counsel in a wholly different controversy, and which are made in good faith, and which in no way prejudice the rights of others involved in the case where the doctrine is invoked." (p. 229).

Thus where an unsworn denial of a title in a pleading is more in the nature of a conclusion than a statement of fact, and is made inconsiderately, and without a due knowledge of the fact, the pleader is not estopped from asserting such title in a subsequent suit against a party not prejudiced by the former denial. *McLemore v. Charleston Ry.*, 111 Tenn. 639.

Further illustrative of the readiness of the Courts to relieve a party from the applicability of the doctrine is the case of *Harris v. Columbia Co.*, 114 Tenn. 328. In that case the plaintiffs in an action admitted in an unsworn pleading that one of them was a corporation. The trial court found that since that party was a foreign corporation, was a necessary party, and had not qualified to do business in Tennessee the action could not be prosecuted. The appellate court held that they were not estopped by the admission to show in a subsequent suit that it was made through an innocent mistake of fact, in the absence of proof of any detriment to the adverse party.

In the case at bar the proof discloses the fact that The Three Way Land Company, a corporation, was owned through its stock by Barton, Taylor and Highfill, therefore the Missouri suit could not have been brought otherwise than in the name of The Three Way Land Company as The Three Way Land Company had not been dissolved at that time. (Tr. pp. 555-556).

After the dissolution of the corporation on July 27, 1942 (Tr. p. 593) but before this remaining asset had been disposed of and distributed (Tr. p. 149) the present action was properly brought in the name of Barton individually and for the benefit of his associates, Highfill and Taylor, under the express authority they had vested in him (Tr. pp. 573-574) and for the benefit of their tenants from whom he held power of attorney (Tr. pp. 600-601). Therefore, the subject matter in both suits was the same; the parties in reality are the same; the relief sought in both suits was substantially the same, and no injury could, or has, resulted, and there is absolutely no inconsistency in prosecuting these actions.

As we have indicated in our Statement of Facts, appellee Fraser contends that an estoppel also arises out of another alleged inconsistency in these two actions in that the Missouri suit recites that the contract sued upon is predicated upon a letter of April 24, 1942, whereas the present action purports to be predicated principally upon a letter of April 2, 1942. Barton, in his testimony states that the letter of April 2, 1942, is the only letter which passed reciting an agreement for sale of the cotton at 15½c per pound. (Tr. p. 589). He further adds that the Missouri action was drawn hurriedly in order to obtain service of process while Fraser was in the jurisdiction. (Tr. p. 587). His uncontradicted testimony is to the further effect that they are one and the same letter and that the letter referred to in the Missouri action through oversight, mistake and inadvertance of the draftsman was incorrectly therein referred to as of April 24th rather than of April 2, 1942. (Tr. p. 589).

The Courts properly sustained both of these contentions on the part of respondents.

PETITIONER CONTRACTED WITH RESPONDENTS TO PAY THE GOVERNMENT PENALTIES

The Courts found that under the terms of the agreement with reference to the purchase of the cotton in question that petitioner Fraser and Britton were to pay respondents seven dollars per bale for their equity after discharging the loan and penalties and that this sum was to be *net* to them. While this agreement could not relieve respondents from any legal responsibility they might owe the Government with reference to liability for payment thereof it certainly fixes the question of liability between the parties.

This finding involves a question of fact amply supported by the evidence and it is not necessary to more than briefly refer to this. Both parties contend that the contract called for a sale of the equity but they differ with reference to the meaning of the term. Petitioner contends that it did not mean *net* above the penalties.

In addition to the correspondence heretofore alluded to, verbal testimony also upholds the contention of respondents and the decrees in their favor in this regard:

C. G. Henry, manager of the Mid-South Cotton Growers Association, which handles more loans in this territory than all other associations combined (Tr. 625) testified that it had a well known business meaning among cotton men and that by usage and custom the sale of an equity meant that the buyer paid both the loan and penalty on the cotton. (Tr. 628-630).

He also testified that Fraser told him that under his contract that he was to pay the penalty. (Tr. 631, 644)

Further that he, Henry, had offered Barton one dollar per bale above the loan and tax (631). Passing strange it would be if Fraser's contention is correct that he was to pay Barton $7.00 per bale and that Barton would assume payment of a penalty averaging $35.00 per bale—such a position is of course absurd. (Tr. 755, 809).

Another prominent cotton man, J. P. Norfleet, gave the same definition of equity as Mr. Henry. (Tr. 713)

Another witness, Wm. McDaniels, stated that Fraser told him in April, 1942, that he could handle the cotton in question at $7.00 per bale above tax and loan. (Tr. 685-687)

David Barton gave the same definition of equity as those above (Tr. 692). He further added that in a conference in March, 1942, Fraser offered his father, P. M. Barton, for their cotton $7.00 per bale above the loan and tax. (Tr. 688-689)

J. W. Luster testified that during the March, 1942, negotiations that he was called into a conference with Fraser and both Bartons as he owned six hundred bales of the cotton. That he authorized Barton to accept Fraser's offer of seven dollars above loan and penalty. (Tr. 698-699).

Barton was very positive in his testimony regarding his theory of the contract. (Tr. 576-578, 563-565).

Fraser on the other hand not only mis-appropriated and concealed the funds due appellants, and the Government, but refused to account to Britton even. (Tr. 875-876). On the witness stand his testimony was so unsatis-

factory and his answers so evasive that the Court remarked on the fact and took over his examination in an effort to elicit the truth with reference to several matters. (Tr. pp. 811, et seq)

In fact, it seems but fair and appropriate to direct the Court's attention to the fact that there is now pending before it this very petitioner's application to review a conviction of perjury arising out of his testimony in this identical case.

CONCLUSION

In addition to the above documentary and parol evidence and the manifest inconsistencies in the petioner's testimony and position there exists the fact that he is undertaking to convince this Court that from the *net* which Barton et al. were to receive of some $12,971.00, they were to pay a Government tax of $55,762.14. This is not only an absurdity, but a physical and financial impossibility. This is further indicative of the preconceived idea abinitio of Fraser to defraud respondents, his Government, and his own partner and which he so ineffectually attempted to disguise by the phraseology of his correspondence—neither of the Courts to which this cause has been submitted were deceived and respondents are confident this Honorable Court will see through his subterfuge and fraudulent scheme and device.

Respectfully submitted,

L. E. GWINN,
Memphis, Tennessee,
Solicitor for Respondents.

FRED CALLAHAN,
Memphis, Tennessee,

GRANVILLE FARRAR,
Memphis, Tennessee,
Of Counsel.

ACKNOWLEDGMENT OF SERVICE

Acknowledgment of service and receipt of two copies of reply to petition for writ of certiorari, statement of the case, brief and argument on behalf of respondents, P. M. Barton, et al.

This January 11th, 1945.

WM. McCLANAHAN,
U. S. District Attorney;

WILS DAVIS,

W. C. RODGERS,

W. H. FISHER,
Counsel for Petitioners.